United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

662

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Appellee,

v.

T. J. DAVIS also known as
EDWARD JACKSON,

Appellant.

Appeal from the United States District Court
for the District of Columbia

No. 23,021

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September 17, 1969

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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*Authorities chiefly relied on.

TABLE OF AUTHORITIES
(Continued)

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*Authorities chiefly relied on.

STATEMENT OF ISSUES PRESENTED

1. Whether the Trial Court should have granted Appellant's motion for judgment of acquittal, since the evidence was such that no reasonable juryman could find beyond a reasonable doubt that Appellant had the specific intent to commit robbery.

2. Whether the Trial Court committed error in rendering an instruction on flight and concealment which neglected to advise the jury of the variety of motives, other than consciousness of guilt, which might have prompted Appellant to flee from the scene of his assault upon the complaining witness.

3. Whether the District Judge abused his discretion in permitting the use of Appellant's prior 1943 conviction for receiving stolen goods for impeachment where Appellant has not been convicted of an offense otherwise admissible under Luck criteria which adversely reflects on his honesty and veracity in the 25 years following this 1943 conviction.

This case has not previously been before this Court.

REFERENCES TO RULINGS

1. At the conclusion of the Government's direct case, counsel for defendant made a motion for judgment of acquittal. This motion was denied by the District Judge (November 12, 1968, Tr. 57, 58).

2. At the conclusion of the defendant's direct case, counsel for defendant renewed his motion for judgment of acquittal. This motion was denied by the District Judge (November 12, 1968, Tr. 80).

3. At the conclusion of all evidence the Trial Court, in considering jury instructions, contemplated the use of a Flight Instruction. Counsel for defendant objected to such an instruction, however, upon the Government's insistance the Court summarily decided to give a Flight Instruction anyway (November 12, 1968, Tr. 82; November 13, 1968, Tr. 94, 95).

4. At the conclusion of the Government's cross-examination of the defendant, the Trial Court allowed the prosecutor to introduce evidence of defendant's 1943 conviction for receiving stolen goods (November 12, 1968, Tr. 79). The question as to the admissibility of such evidence was considered by the Court prior to the defendant's taking the stand to testify (November 12, 1968, Tr. 4-10).

STATEMENT OF THE CASE

Appellant, T. J. Davis also known as Edward Jackson, was indicted on one Count charging him with assault with intent to commit robbery. (Title 22-501, D. C. Code) He was tried by jury on the one Count and was convicted. The Government's case consisted of three witnesses: (1) Ericka Daxberger, the complaining witness; (2) Roy L. Smith, a private detective with the National Detective Agency; and (3) Detective William H. Cross of the Metropolitan Washington Police Force. The testimony of these witnesses is summarized below.

Testimony of Ericka Daxberger

Mrs. Daxberger, a waitress regularly employed at the Bavarian Restaurant, 727 - 11th Street, N. W., Washington, D. C., testified that on July 12, 1968, at about 12:30 A.M., she left her work and proceeded directly to a parking lot on the corner of 10th and H Streets, N. W., where her Volkswagen automobile was parked. (Tr. 19-22, 31) She carried with her a pocketbook which she placed on the front passenger seat, the seat on the right-hand side of the automobile, when she got into her car. (Tr. 22, 31, 29) After getting into her car, Davis approached the car and inquired of her through the open window, "Do you have a dime?" To this she answered "No." (Tr. 21, 23, 32) Davis then asked her if she had two nickels, to which she also responded in the negative. (Tr. 20-21, 31-32) At this point, Davis put his hand through the open window of the car and started strangling her. (Tr. 21, 23) Mrs. Daxberger denied having made any disparaging remarks

concerning Davis' Negro race. (Tr. 32)

Mrs. Daxberger further testified that when Davis began to beat her he came into her car; she fought back while trying to get away. (Tr. 21, 24, 32-33) She said that she tried to get out on the other side of the car, the right-hand side, although the door did not open immediately. When it suddenly did open, she fell out of the car. (Tr. 21, 24) Davis "came through the car" and continued to beat her when outside of the automobile. (Tr. 21, 24, 33) When Davis stopped hitting her, she testified that he turned around and reached in the back of her car and then left. (Tr. 24-25, 33-34) Later, on redirect examination, Mrs. Daxberger testified that Davis reached behind her into the car. (Tr. 39-40)

She testified that during the assault her pocketbook "must have fell off the seat" and onto the "front [floor] part" of the car. (Tr. 33) Since she did not see her pocketbook after she fell out of her Volkswagen, at first she thought Davis had taken it. She testified, however, that at no time did she see Davis with the pocketbook. (Tr. 35) The pocketbook was later found outside the car on the passenger's side. (Tr. 52) Mrs. Daxberger testified that she did not think it had been opened. (Tr. 35).

Testimony of Roy L. Smith

Roy L. Smith, a dispatcher with the National Detective Agency, testified that in the early hours of July 12, 1968, as he was leaving work at 933 - H Street, N. W., he heard a woman screaming and that in response thereto he went to investigate with an Officer Webb, a fellow

employee. (Tr. 45) Upon arriving at the area from which the screams were coming, Messrs. Smith and Webb saw a woman screaming and Davis, who was wearing a light jacket, running away from her. (Tr. 43, 45-47) The two private detectives chased Davis along the 900 block of Eye Street until Davis jumped a four-foot fence and attempted to hide behind a tree. (Tr.45-46) After Smith drew his revolver and asked Davis to rise he was taken into custody and turned over to D. C. Police Officers Cross and Sobsachs. (Tr. 46,51)

Testimony of Detective William H. Cross

Detective Cross of the Washington Metropolitan Police testified that he found $88.00 in Davis' possession at the time he was taken into police custody. (Tr.55) In addition, in looking into Mrs. Daxberger's automobile he discovered, among other things, her purse lying on the ground outside the car on the passenger's side. (Tr. 51-52)

Following the presentation of the Government's evidence, Appellant made a motion for judgment of acquittal. (Tr. 57) This motion was denied by the District Judge. (Tr. 57-58)

Testimony of T. J. Davis

The sole witness for the defense was Appellant, T. J. Davis, who took the stand in his own behalf. He testified that he saw Mrs. Daxberger get into her car and that his only remark to her was, "hello there, beautiful." (Tr. 62,64) In response to this greeting Mrs. Daxberger called him a "Nigger." (Tr. 63, 64) He asked her "What did you call me?" and "why she do that for." (Tr. 63, 64) Davis admitted that he struck Mrs. Daxberger with his fists after she had called him a "nigger," (Tr. 63, 64, 66-67, 74-75) although he did not try to choke her. (Tr. 64)

Following his attack upon Mrs. Daxberger, Davis testified that he ran away because he was being approached by civilians and several officers. (Tr. 64) He testified that he had no intention of taking Mrs. Daxberger's purse or anything else belonging to her. (Tr. 63, 65, 67) At the time the assault on Mrs. Daxberger took place he had in his possession $88.00 which he had received that day as remuneration for his employment as a janitor at the Jefferson Apartments, 4201 - 7th Street, S. E. (Tr. 58-59, 63)

Davis testified that in the hours prior to this incident he had been drinking for some time and that he had consumed half a fifth of Old Taylor bourbon as well as a half pint of wine. (Tr. 65-67) On cross-examination, Davis testified that he consumed the wine about 3:30 P.M. and that he consumed the half-fifth of bourbon around 10:30 P.M. when he arrived downtown. (Tr. 68) He also testified that while at a club on 14th and Church Streets, N. W., he consumed, in addition, two beers at about 11:30 P.M. (Tr. 69) 1/

At the conclusion of all the evidence, Appellant renewed his motion for judgment of acquittal. This motion was denied. (Tr. 80)

Consideration of the Luck Doctrine

At the beginning of the trial before the jury was brought into the courtroom there was a reasonably extensive, on-the-record discussion of the Luck issue as it related to Davis' intention to

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1/ Mrs. Daxberger (Tr. 23), Mr. Smith (Tr. 47-48), and Detective Cross (Tr. 52) all testified that Davis' breath did not smell of alcohol and that he otherwise appeared sober at the time they came into close contact with him.

take the witness stand in his own behalf. (Tr. 4-10) The prosecutor told the Court that Davis had an extensive criminal record going back to 1936 and 1940. In the course of this discussion it was revealed that Davis' record of criminal convictions since 1943 was as follows:

1943 - Receiving Stolen Goods Conviction

1945 - Robbery Conviction

1948 - Second Degree Murder Conviction

1954 - Escape Conviction

1965 - Released from Prison for Second Degree Murder Conviction (Tr. 4-7)

The district Judge expressed the opinion that convictions for larceny on two occasions in 1941 and a robbery conviction in 1945 were, in the terminology of the Court of Appeals, "fairly remote" although the Government countered with the opinion that they were remote only in that he had been incarcerated for second degree murder and, therefore, for the last 20 to 25 years had no opportunity to participate in any criminal activities. (Tr. 6)

In deciding whether Davis had led a "legally blameless life" the Judge said: "I would take it legally blameless would mean there would be no convictions rather than charges appeared." (Tr. 6) The Government urged the Court to consider the remoteness of several charges occurring since 1965 when Davis was released from prison after serving a sentence for second degree murder. (Tr. 7)

The most recent conviction involving dishonesty was a 1945 conviction for robbery. However, this was excluded by the District Judge because "its probative value is suspect in that it might be interpreted by the jury as indicating a propensity for the type of

crime with which he is charged in this indictment rather than simply putting his credibility in issue." (Tr. 9)

The District Judge decided to allow the Government to go into Davis' 1943 conviction for receiving stolen good as an offense involving dishonesty. (Tr. 9) 2/

2/ The entire discussion between the Court and counsel regarding the Luck question was as follows:

THE COURT: Well, the Court will hear from the government as to what use the government wishes to make of the defendant's prior criminal record.

MR. FINKELSTEIN: The defendant's record goes back to 1936, and consists of numerous convictions ranging from petit larceny to second degree murder.

THE COURT: I think the Court would be controlled by what the Court of Appeals has written particularly in the Gordon case with reference to the type of interrogation the Court would permit. I will consider any offense involving dishonesty.

MR. FINKELSTEIN: He has been convicted of larceny on two occasions, in 1961;[The "1961" date is an error in the Reporter's Transcript and should read "1941"] he has been convicted of robbery in 1945.

THE COURT: Those are fairly remote, to use the terminology of the Court of Appeals.

MR. FINKELSTEIN: Remote only in the sense he hasn't been given an opportunity in the last 20 to 25 years to participate in any criminal activities. He has been incarcerated on the second degree murder conviction, but since his release for that conviction he has a series of charges which the record indicates is presently pending against him. Now, we wouldn't use any of those cases. I think it is worthy for Your Honor to considerthe remoteness of the other charges that goes to the consideration as to whether he still has a clean slate, and whether he has been rehabilitated since 1945.

THE COURT: The phraseology of the Court of Appeals used in Gordon in that connection is whether the defendant has led a legally blameless life. I would take it legally blameless would mean there would be no conviction rather than charges appeared.

MR. FINKELSTEIN: I would think that in considering whether a decision is remote or not, Your Honor could take into consideration any pending charges.

THE COURT: What is the most recent conviction?

MR. FINKELSTEIN: The most recent conviction is escape in 1954, which I assume is related to the incarceration on the murder conviction in 1948. He appears to have a forgery in 1965, but I can't tell from this record what the disposition was, forgery charge in 1965, but I am not sure what the disposition was.

* * * * *

The Trial Court's Instruction on Flight

In a discussion at the bench during the trial, the prosecutor, Mr. Finkelstein, and the defense counsel, Mr. Lappin, discussed with the Court the nature of the instructions which the Court would give to the jury prior to their deliberation. (Tr. 81-84) With respect to the propriety of an instruction on flight and concealment, the following colloquy took place:

> THE COURT: Number 27, Flight or Concealment by a Defendant, I wonder if that is necessary --
>
> MR. LAPPIN: In view of the fact --
>
> MR. FINKELSTEIN: I specifically request that.

2/ Continued:

> THE COURT: Now, what is the most recent case within the purview of the Gordon decision?
>
> MR. FINKELSTEIN: The most recent case, I believe, is Jones, Your Honor, Roy Jones, which is very recent.
>
> THE COURT: No, I didn't make myself clear. What do you have that would fit the criteria of Gordon?
>
> MR. FINKELSTEIN: Well, sir, certainly receiving stolen goods in 1943, robbery in 1945, and larceny.
>
> THE COURT: I think I will let you go into the question of receiving stolen goods. That is an offense involving dishonesty. I think the difficulty of letting you ask questions about the robbery charge is that its probative value is suspect in that it might be interpreted by the jury as indicating a propensity for the type of crime with which he is charged in this indictment rather than simply putting his credibility in issue. (Tr. 6-9)

THE COURT: I think under the testimony in the case, particularly that for the Government, the Government is entitled to it.

MR. LAPPIN: Yes, sir. (Tr. 82)

Pursuant to the Government's request that the Court's decision to give an instruction on flight, the following charge was given to the jury:

> Now, Ladies and Gentlemen, there was evidence in the case introduced by the Government which indicated flight and concealment on the part of the defendant after this offense took place. In that connection, if you credit the evidence, I wish to give you this instruction.
>
> Flight and concealment by a defendant after a crime has been committed does not create a presumption of guilt. You may consider evidence of flight, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment, if any, by the defendant in connection with all the other evidence in the case and give it such weight in your judgment it is fairly entitled to receive. (Tr. 94-95)

Following the District Judge's charge, the jury proceeded to deliberate for one and one-half days (Tr. 104-109) before returning a verdict of guilty on one Count of assault with intent to commit robbery. This appeal was subsequently filed.

ARGUMENT

I

THE COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

As stated, at the conclusion of the Government's direct case, counsel for defendant made a motion for judgment of acquittal. This motion was denied by the District Judge. The motion was renewed and again denied at the conclusion of all the evidence. It is submitted that the failure to grant this motion was error requiring reversal by this Court.

A. The Rule Governing Sufficiency of the Evidence

In challenging the sufficiency of the direct case against Appellant, it is, of course, true that "the jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Campbell v. United States, 115 U.S. App. D.C. 30, 31, 316 F.2d 681, 682 (1963); United States v. Wilson, 361 F.2d 134 (7th Cir. 1966). Moreover, according to the "true rule" announced by this Court in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850 (1947), the District Judge should deny a motion for acquittal and permit submission of the case to the jury only when he has concluded that:

> upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. 3/

3/ 81 U.S. App. D.C. at 392, 160 F.2d at 232. See also Crawford v. United States, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967) and Austin v. United States, 127 U.S. App. D.C. 180, 382 F.2d 129 (1967). In the Austin case

Appellant submits that pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure[4/] and according to the standards announced by this Court, the District Judge erred in submitting the case to the jury and in not granting his motion for judgment of acquittal. Even viewing the Government's evidence in the most favorable light, "a reasonable juror must have a reasonable doubt as to the existence of the essential element of the crime" — in this case, the critical showing that Davis had the specific intent tocommit robbery at the time he assaulted Mrs. Daxberger. Austin v. United States, supra, 127 U.S. App. D.C. 180, 189, 382 F. 2d 129, 138 (1967).

B. Insufficient evidence on the question of specific intent to commit robbery

With the foregoing standards in mind, it is necessary to review somewhat in detail the direct evidence presented by the Government which would "sustain" a finding that Appellant had the specific intent to commit robbery at the time he assaulted Erika Daxberger. Crawford v. United States, supra, 126 U.S. App. D.C. 156, 158, 375 F.2d 332,334 (1967).

3/ Continued:

this Court said:

> "A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime." 127 U.S. App. D.C at 189, 382 F.2d at 138.

4/ Rule 29(a) provides, in pertinent part, that "The court on motion of a defendant or of its own motion shall order the entry of acquittal if one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

The only shred of evidence adduced by the Government which had any tendency to show a specific intent on the part of Davis to rob the complaining witness was her inconclusive testimony that when he ceased beating her, and before he left, Davis reach in the back of her automobile. (Tr. 34) This allegation is seriously weakened, however, by Mrs. Daxberger's further testimony that at the time she saw Davis reach into the back of her car "I couldn't hardly see, because there was blood running over my eyes." (Tr. 34)

No evidence was introduced by the Government which gave any indication that Davis ever demanded money from Mrs. Daxberger. There was testimony from Mrs. Daxberger to the effect that Davis had twice asked her for ten cents--at first, "Do you have a dime?"; and finally, "Do you have two nickels?" (Tr. 20,21,23,31-32) However, even the District Judge in his instructions to the jury recognized that such a simple request had the money been given, would not constitute a robbery but a "voluntary giving". (Tr. 99)

Neither was there any evidence presented by the Government which demonstrated a specific intent on the part of Davis to take the pocketbook of the complaining witness. Mrs. Daxberger testified that when she first got into her car she placed her pocketbook on the right front seat and that during the course of Davis' assault on her both she and her assailant passed through the small Volkswagen automobile from the driver's side to the passenger's side. (Tr. 21, 24, 33) Mrs. Daxberger further testified that the pocketbook "must have fell off the seat when I slid over" and "on [to] the floor part [of the car]." (Tr. 33) Detective Cross of the Metropolitan Police Force testified that he found the pocketbook on the ground outside the passenger's side of the car (Tr. 51-52) where it could easily

have been knocked from the passenger's seat as both Mrs. Daxberger and Davis came struggling through the small car.

Finally, through eyes that "couldn't hardly see" Mrs. Daxberger claimed to have seen Davis reach in the back of her car[5/] although

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5/ In addition to not being able to see very well, the record also indicates that Mrs. Daxberger was herself not very clear about Appellant's reaching motion. On direct examination, Mrs. Daxberger testified that Davis "got up and he reached back through the door or the seat, he, and he reached for something, and then he left." (Tr. 24-25). Under cross-examination, however, Mrs. Daxberger testified as follows:

MR. LAPPIN: At a given time, he stopped beating and reached into the back of the automobile?
MRS. DAXBERGER: Pardon me?
MR. LAPPIN: At a certain time, he ceased beating you and reached in the back of your automobile, is that your testimony?
MRS. DAXBERGER: In the back?
MR. LAPPIN: Yes?
MRS. DAXBERGER: Just before he left, yes. (Tr. 33-34)

Finally, on redirect examination, Mrs. Daxberger contradicted her earlier testimony:

MR. FINKELSTEIN: Now, you say when the defendant ran from the scene, he reached in the automobile, could you see where he was reaching?
MRS. DAXBERGER: Not directly where, but he was reaching back.
MR. FINKELSTEIN: You say he was reaching back?
MRS. DAXBERGER: Yes, he was.
MR. FINKELSTEIN: He was reaching back of him, or in back?
MRS. DAXBERGER: He turned. I had my hat on close to the back seat and he was reaching behind me, my head.
MR. FINKELSTEIN: He was reaching behind you?
MRS. DAXBERGER: Yes.
MR. FINKELSTEIN: Where were you?
MRS. DAXBERGER: On the right side of the car.
MR. FINKELSTEIN: You were out of the car or in?
MRS. DAXBERGER: Yes, out of the car.
MR. FINKELSTEIN: You were out of the car, and he was reaching behind you?
MRS. DAXBERGER: Yes.
MR. FINKELSTEIN: Could you see where in the car he was reaching?
MRS. DAXBERGER: No.
MR. FINKELSTEIN: But you just observed him reaching into the vehicle?
MRS. DAXBERGER: Yes. (Tr. 39-40)

the pocketbook had been placed on the right front seat and, in fact, may have been knocked to the ground outside the passenger's door by either Mrs. Daxberger or Davis when they came through the car. Furthermore, there was testimony from Mrs. Daxberger that she did not see Davis with her pocketbook and that she did not think her pocketbook had been opened. 6/ (Tr. 35)

Where is the Government's clear evidence that Davis specifically intended to commit robbery? He made no "demand" for either Mrs. Daxberger's money or property since she testified that he asked her for only small change. Plainly, specific intent to commit robbery cannot be implied merely from Davis' alleged "reaching motion" following the assault, or from the placement of the pocketbook, especially since Mrs. Daxberger's testimony

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6/ Mrs. Daxberger's testimony regarding the condition of her pocketbook was equally unclear. On cross-examination she testified as follows:

MR. LAPPIN: When he [Officer Cross] found your purse, Mrs. Daxberger, did you look into the purse?
MRS. DAXBERGER: Yes.
MR. LAPPIN: To see if anything was missing?
MRS. DAXBERGER: No.
MR. LAPPIN: Had it been opened?
MRS. DAXBERGER: I don't know, I don't think so. (Tr. 35)

Later, on redirect examination, however, Mrs. Daxberger hedged with respect to her earlier statement regarding the condition of the purse:

MR. FINKELSTEIN: When you next saw the purse, what condition was it in?
MRS. DAXBERGER: When I saw the purse next, it was when the detective handed it to me, he said, "here is your purse."
MR. FINKELSTEIN: Was it in the same condition it was in when you put it on the driver's seat?
MRS. DAXBERGER: I don't remember. (Tr. 39).

and physical condition did not evidence or promote a great deal of certitude on her part as to precisely what transpired immediately following the assault. Furthermore, if Davis intended to commit robbery, why did he prolong the beating of a screaming woman, pursue her through a small foreign car and, in her own words, attempt to strangle her? (Tr. 21) In addition, Detective Cross of the Metropolitan Police testified that he found $88.00 on Davis which belonged to him. This fact alone further underscores the likelihood that Davis did not specifically intend to commit robbery; but rather, as he testified, that he was reacting solely to a demeaning racial slur.

In conclusion, therefore, Appellant submits that the Government has introduced only one, inconclusive item of evidence tending in any way to demonstrate that he had the specific intent to commit robbery--that although the complaining witness "couldn't hardly see" she nevertheless saw him reaching into the back of her car. In sharp contrast to this solitary and confusing allegation is evidence that no <u>demand</u> for money or property was made upon Mrs. Daxberger; that her pocketbook, which had been placed on the <u>front</u> seat of her small Volkswagen, must have fallen to the front floor of the car; that Davis was never seen in possession of or even touching the pocketbook; that Davis had $88.00 of his own money on his person at the time of the assault; and that, rather than quickly beating the complaining witness in an attempt to forcibly take personal property, he continued to attack this screaming woman, pursued her through a small foreign car and, according to her testimony, even tried to strangle her. Taken altogether and in the view most favorable to the Government, Appellant submits that the foregoing evidence respecting specific intent

to commit robbery--as opposed to admitted, simple assault--was insufficient as a matter of law to submit to a jury. The Government's solitary shred of conflicting evidence, that Davis reached into the back of her car, when considered with the other facts adduced at the trial, are such that a reasonable juror must have a reasonable doubt as to the existence of Davis' specific intent to commit robbery as charged in the indictment. Accordingly, the District Judge erred in submitting the case to the jury and in not granting the defendant's timely motions for judgment of acquittal.

II

THE COURT ERRED IN ITS CHARGE TO THE JURY CONCERNING FLIGHT

A. An Attempt to Make a Timely Objection to the Court's Instruction on Flight was Made by Counsel for Defendant, Thereby Preserving This Issue on Appeal. Rule 30, Fed. R. Crim. Proc.

Before the Court charged the jury, counsel for defendant and the Government prosecutor approached the bench and discussed with the trial Judge the nature of the instructions which would be given to the jury. (Tr. 81-84) With respect to the propriety of an instruction on flight and concealment, defense counsel made an attempt to comment to the Court when he was abruptly interrupted and cut off by the prosecutor who demanded the inclusion of a flight instruction. This demand was summarily granted by the Court, as follows:

THE COURT: Number 27, Flight or Concealment by a Defendant. I wonder if this is necessary --

MR. LAPPIN [Defense Counsel]: In view of the fact --

MR. FINKELSTEIN [Assistant U.S. Attorney]: I specifically request that.

THE COURT: I think under the testimony in the case, particularly that for the Government, the Government is entitled to it.

MR. LAPPIN: Yes sir. (Tr. 82)

In view of the fact that the Court's instruction on flight and concealment generally followed the hitherto salutary model suggested by the Junior Bar Section of the District of Columbia Bar

Association, 7/ defense counsel below could not have been on notice nor could he have anticipated the subsequent change in the case law respecting flight instructions, especially when, in an attempt to comment, he was abruptly interrupted by a demand for the instruction by the prosecutor and when the demand was summarily granted by the trial Court. Under these circumstances, therefore, this Court should view the comment of defense counsel below, "In view of the fact --" as being tantamount to an objection in the trial Court thereby preserving the right of appeal on this point in this Court pursuant to Rule 30 of the Fed. R. Crim. Proc. 8/ The District Judge should have allowed defense counsel to finish his comment. However, once the Judge summarily ruled in favor of granting the Government's request for the instruction regarding flight and concealment, defense counsel was not obliged to raise an objection later.

7/ The Junior Bar instruction and case authority are as follows:

> FLIGHT OR CONCEALMENT BY DEFENDANT
>
> Flight or concealment by the defendant, after a crime has been committed, does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.
>
> Allen v. United States, 164 U.S. 492, 498-499 (1896); Hunt v. United States, 115 U.S. App. D.C. 1, 3-4, 316 F.2d 652, 654-655 (1963); Green v. United States, 104 U.S. App. D.C. 23, 25, 259 F.2d 180, 182 (1958), cert. denied, 359 U.S. 917; Edmonds v. United States, 106 U.S. App. D.C. 373, 379-380, 273 F.2d 108, 114-115 (1959); Wright v. United States, 116 U.S. App. D.C. 60, 320 F.2d 782 (1963); Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963).

Bar Association of D. C. Criminal Jury Instructions for the District of Columbia 15 (Charge No. 27) (1966).

8/ Rule 30 provides, in pertinent part, that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

B. The Flight Instruction Proffered the Jury by the Trial Court Has Been Expressly Disapproved by this Court of Appeals.

In its instructions to the jury, the Court made the following comment concerning the defendant's flight from the scene of his admitted assault upon the complaining witness, Mrs. Ericka Daxberger:

> Now, ladies and gentlemen, there was evidence in the case introduced by the Government which indicated flight and concealment on the part of the defendant after this offense took place. In that connection, if you credit that evidence, I wish to give you this instruction.
>
> Flight and concealment by a defendant after a crime has been committed does not create a presumption of guilt. You may consider evidence of flight, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment, if any, by the defendant in connection with all the other evidence in the case and give it such weight in your judgment it is fairly entitled to receive. (Tr. 84-95)

Following this careful instruction on flight, the jury proceeded to deliberate on the verdict for one and one-half days before finally arriving at the unanimous opinion that the defendant was guilty of assault with intent to commit robbery as charged in the indictment. (Tr. 104-109) The case was obviously very close and presented a very difficult question for the jury. In finally reaching this decision, however, the jury was required to ponder the very meager and insufficient evidence going to the question of the defendant's specific intent to commit robbery. Certainly, one of the most damaging inferences which they were encouraged to consider, at the invitation of the District Judge, was Davis' purported flight following the assault. "You may consider evidence of flight, however, as tending to prove the defendant's consciousness of guilt" the trial Court advised the 12 laymen to whom, in

the face of very insubstantial evidence on the question of specific intent to commit robbery, "running away" from the scene of a crime could only have one implicating meaning, especially when aided by the dutiful promptings of the Court itself. (Tr. 95)

One is left, therefore, to speculate about the true impact such a flight instruction had on the eventual outcome of the case a day and one-half later. The fact that by 4:30 P.M. of the first day the jury could not reach a unanimous decision after having deliberated six long hours since 10:30 A.M. is strong evidence that the defendant's guilt did not present an easy question and, therefore, further increases the likelihood that the District Judge's instruction regarding flight and concealment and the inferences which may have been drawn therefrom had an important, if not dispositive, effect on the 12 laymen serving on the jury. (Tr. 104-109) Since, as is Appellant's contention in this appeal, the trial Court's instruction on flight and concealment was legally erroneous on its face, the error should not be deemed harmless, especially in the event this Court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716 (1949). Appellant respectfully submits, therefore, that in view of the fact that the evidence introduced by the Government on the question of specific intent to commit robbery was extremely weak and speculative, and since the jury was unable to reach a unanimous verdict in an obviously close case until the second day of its deliberation, the trial Court's instruction on flight and concealment had a very substantial effect in bringing about a verdict for conviction.

In a recent case decided by a unanimous panel of this Court, Austin v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,044, decided May 27, 1969, Slip Opinion), a flight instruction virtually identical to the instruction given by the trial Court [9/] was held to be erroneous in that it was not accompanied by a "fuller explanation by the judge of the variety of motives which might prompt flight, and thus of the caution which a jury should use before making the inference of guilt from the fact of flight." (Slip Opinion, page 4) Speaking for this Court, Circuit Judge J. Skelly Wright said:

> Although in argument both parties seem to have accepted the proposition that it is "well settled" in this jurisdiction that evidence of flight can be used to infer guilt, in fact the weakness of such an inference has long been pointed out . . . . We have not decided any cases since Miller in which a flight instruction such as the present one was in issue. However, it should be clear that Wong Sun and Miller have pointed inescapably to the fact that flight instructions should be accompanied by a fuller explanation by the judge of the variety of motives which might prompt flight, and thus of the caution which a jury should use before making the inference of guilt from the fact of flight. It is apparent that the instruction in this case (and the D. C. Bar Association's instruction which served as its basis) fell short of such a full explanation. We hold that an inadequate charge such as the present one was erroneous. (Slip Opinion, pages 2-3, 4)

9/ "One factor you may take into account is whether or not you find that there has been flight or concealment by the Defendant after a crime has been committed. This does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight or concealment by the Defendant in connection with the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (Slip Opinion, page 2)

The "Junior Bar" flight instruction given by the District Judge in the present case likewise failed to include the "fuller explanation" of the variety of motives which might have prompted Appellant to run from the scene of his assault upon Mrs. Daxberger, the complaining witness. Accordingly, the Austin case, supra, is dispositive of the question as to whether the flight instruction given by the trial Court in the present case was erroneous as a matter of law. For this reason and in view of the prejudicial effect the flight instruction likely had on the jury over the course of one and one-half days of consideration of otherwise scanty evidence regarding Appellant's specific intent to commit robbery, the judgment of the District Court should be reversed.

C. Notwithstanding the Possible Failure of Defense Counsel to Object to the Flight Instruction in the Trial Court, The Erroneous Charge Constituted "Plain Error" Pursuant to Rule 52(b), Fed. R. Crim. Proc.

Under the Plain Error Doctrine of Rule 52(b) [10] of the Federal Rules of Criminal Procedure where errors complained of in the trial Court were plain and the natural and probable influence of such errors on the jury was prejudicial, and the right of the defendant to a fair and impartial verdict of the jury was substantially affected, the Court of Appeals may take notice of the errors, though they were not brought to the trial Court's attention. Robertson v. United States, 83 U.S. App.

10/ "Plain Error. Plain errors or defect affecting substantial rights may be noticed although they were not brought to the attention of the court."

D.C. 185, 171 F.2d 345 (1948). Appellant respectfully submits that he was clearly prejudiced by the trial Court's instruction on flight and concealment when the meager nature of the evidence tending to prove a specific intent to commit robbery, discussed supra, is taken into full account. Although one can only speculate as to the weight attached by the jury to Appellant's alleged flight at the invitation of the Court, it is reasonable to believe, under the circumstances of the jury's one and one-half-day deliberation, that this particular instruction was clearly the strongest factor in bringing forth a unanimous verdict for conviction. Moreover, the jury was not advised by the trial Court, as this Court now requires, of the variety of motives which might have prompted Appellant to leave the scene of the assault. For example, Appellant testified at some length concerning his heavy drinking during the hours immediately preceding the attack on Mrs. Daxberger. (Tr. 65-67, 69) Therefore, being in a state of near-intoxication, he could have left the scene quite innocently without, in the words of this Court, "any consciousness of guilt." In addition, it is possible that having meted out his personal retribution for Mrs. Daxberger's alleged racial slur, "nigger," he ran, not for having intended to commit robbery, but for having consummated the simple assault which he readily admitted during the trial. (Tr. 63, 64, 66-67, 74-75) In other words, he had good reason to flee what he termed the approach of "civilians and a couple of officers" who had "drawed their guns," (Tr. 64) quite apart from any alleged robbery attempt. Furthermore, in a city where racial violence is commonplace, the hurried approach of two white plainclothesmen could have caused him to flee for his safety since a fear of "police brutality" is of great concern to many Negroes.

Accordingly, under the rule announced by this Court in Austin v. United States, supra -- a rule which this Court gleaned from case law antedating the consideration of this case -- the trial Court, in addition to the necessity of using the flight instruction sparsely, 11/ should, at the very least, have advised the jury of the "variety of motives" which may have prompted the Appellant to flee from Mrs. Daxberger's presence following the assault. As the instruction on flight and concealment stood, however, the jury was told, erroneously, only that it might infer guilt which, after long deliberation, it eventually decided to do.

There are no hard and fast classifications in either the application of the principle of plain error or the use of descriptive titles, since determinations of whether error in a criminal case was obvious and affected substantial rights are to be made upon the facts of a particular case. DuPoint v. United States, 388 F.2d 39 (5th Cir. 1967). In the case at bar, the Appellant's liberty, a substantial right in and of itself, is at stake. Davis was convicted of assault with intent to commit robbery on evidence which, as discussed supra, was insufficient to submit to the jury. In view of the foregoing, Appellant contends that the erroneous instruction on flight and concealment was prejudicial and affected the substantial rights of the accused in this case, and therefore amounted to "plain error" pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure.

11/ Wong Sun v. United States, 371 U.S. 483 (1963); Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963); Austin v. United States, supra, (Slip Opinion, page 4).

In Wright v. United States, 116 U.S. App. D.C. 60, 63, 320 F.2d 782 (1963), this Court disapproved a flight instruction which advised the jury that flight creates "a presumption of guilt." This Court said:

> If appellant had objected to the [flight] instruction, reversal would be required. But in the circumstances of this case, where the crucial issue was one of identification, the evidence of appellant's alleged flight was of such slight independent significance that we cannot characterize the instruction as plain error affecting substantial rights. Rule 52(b), Fed. R. Crim. Proc. 12/

In contradistinction to the Wright case, however, the crucial issue of great "independent significance" in Appellant's conviction on one Count of assault with intent to commit robbery was the erroneous instruction on flight and concealment. Accordingly, under the reasoning of this Court in the Wright case, that instruction constituted "plain error" affecting substantial rights and "requires" this Court to reverse his conviction.

In conclusion, Appellant respectfully asks this Court to carefully scrutinize the substance of his contention that the plainly erroneous instruction on flight and concealment was prejudicial error which substantially affected his rights as a defendant in the trial Court -- rather than to seize upon the technicalities of whether or not objections were appropriately made in the trial Court by his Court-appointed counsel. Appellant further submits that his Court-appointed attorney should not have been required to anticipate a later change in the law which disapproved the D. C. Junior Bar model instruction on flight and concealment. Notwithstanding the possible failure to raise this point below, however, it is reviewable in this Court of Appeals as plain error. Rule 52(b), F. Rules Crim. Proc.

12/ 116 U.S. App. D.C. at 62, 320 F. 2d at 784.

III

THE DISTRICT JUDGE ABUSED HIS DISCRETION BY PERMITTING THE ADMISSION OF A REMOTE, PRIOR CONVICTION FOR RECEIVING STOLEN GOODS

In considering how the District Court is to exercise the discretionary power recognized by this Court in Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), there are many factors that may be relevant. One of the most important considerations to be weighed by the District Judge in deciding whether or not to exclude evidence of prior convictions in a particular trial is the question of "remoteness." As this Court later pointed out:

> "The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness." 13/

After an on-the-record discussion of the Luck doctrine as it related to Davis' desire to take the stand as the sole witness in his own defense, the District Judge permitted the government to introduce evidence of a 1943 conviction for receiving stolen goods. (Tr. 4-10) Appellant submits that this 25-year old conviction, regardless of whether or not he can be considered to have lived a "legally blameless life" since 1943, is manifestly too remote in time from the present

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13/ Gordon v. United States, 127 U.S. App. D.C. 343, 347, 383 F.2d 936, 940 (1967).

offense charged and therefore should have been excluded by the District Judge. Even considering the standard of the "legally blameless life," Appellant has not been convicted, i.e., legally blamed, for a crime involving dishonesty since a remote 1945 conviction for robbery, a 23-year old offense which the District Judge wisely excluded from consideration in this similar case of alleged assault with intent to commit robbery on Luck grounds.

What the District Court must be concerned with in deciding whether to permit impeachment by allowing the introduction into evidence of prior criminal convictions is the honesty and veracity of the witness as reflected by the nature of the prior conviction. As this Court pointed out in the Gordon case:

> "[T]he legitimate purpose of impeachment . . . is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearings on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not." 14 /

In view of the "legitimate purpose of impeachment" as discussed above in the Gordon opinion, the requirement that the witness must also have lived a "legally blameless life" in order to disqualify

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14 / Gordon v. United States, supra.

a remote prior conviction is, Appellant submits, far too broad and vague a standard, especially since the District Court, by this Court's direction, should only concern itself with prior conduct which reflects on a witness' honesty and integrity. Applying the proper standard to the case at bar -- "remoteness" and an absence of evidence which reflects adversely on honesty and veracity -- the Appellant has not been convicted of a solitary offense admissible under Luck criteria since 1943 which reflects adversely on his honesty and integrity. More than half an adult lifetime, or 25 years, since the 1943 receiving stolen goods conviction, admitted into evidence by the District Judge, is plainly too far upstream in the course of human behavior for a panel of 12 laymen to grope in an attempt to find the early traces of the current of dishonesty which they think they may now see from the vantage point of the jury box. Accordingly, Appellant respectfully submits that the District Judge abused his discretion in admitting the "remote" 1943 conviction, and that this Court, therefore, should reverse the judgment of the District Court.

Request for Relief

The appropriate remedy in this case is to vacate Appellant's conviction and enter a judgment of acquittal. In the alternative, this Court should remand the case to the District Court for a new trial.

Conclusion

Based upon the foregoing, it is respectfully requested that the judgment of conviction entered by the District Court in Criminal Case No. 1435-68 must be set aside.

Respectfully submitted,

By /s/ THOMAS W. WILSON
Thomas W. Wilson

By /s/ B. DWIGHT PERRY
B. Dwight Perry

By /s/ RALPH W. HARDY, JR.
Ralph W. Hardy, Jr.

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(By Appointment of this Court)

September 17, 1969